Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling that VarTec Telecom, Inc., Is Not Required to Pay Access Charges to Southwestern Bell Telephone Company or Other Terminating Local Exchange Carriers When Enhanced Service Providers or Other Carriers Deliver the Calls to Southwestern Bell Telephone Company or Other Local Exchange Carriers for Termination	)	WC Docket No. 05-276
	)	
SBC ILECs' Petition for Declaratory Ruling That UniPoint Enhanced Services, Inc. d/b/a PointOne and Other Wholesale Transmission Providers Are Liable for Access Charges	)	WC Docket No. 05-276
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	

COMMENTS OF WILTEL COMMUNICATIONS, LLC

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COMMENTS OF WILTEL COMMUNICATIONS, LLC

I. INTRODUCTION AND SUMMARY

WilTel Communications, LLC ("WilTel") hereby submits its Comments on the petitions referenced above.1/ WilTel agrees with SBC that ILECs are entitled to receive access charges for calls that originate and terminate on the PSTN, regardless of the technology used or the company providing the network transmission, and that a party cannot escape access charge payment obligations merely by classifying itself as something other than an interexchange carrier. WilTel agrees with VarTec, however, that ILECs may not impose access charges on carriers with whom they do not directly interconnect, and with whom they lack contractual

1/ Public Notice, *Pleading Cycle Established for SBC's and VarTec's Petitions for Declaratory Ruling Regarding the Application of Access Charges to IP-Transported Calls*, 20 FCC Rcd 15241 (2005).

privity. The Commission must act quickly to resolve these and other intercarrier compensation issues to provide regulatory certainty, prevent further litigation and allow the industry to focus scarce resources on serving customers rather than on seeking and defending against regulatory arbitrage opportunities.

In these petitions, SBC and VarTec are revisiting basic principles that already should be obvious and have been addressed squarely by the Commission. In the *AT&T IP-in-the-Middle Order*, the Commission made clear that access charges apply to transmissions that originate and terminate on the PSTN with no net protocol conversion and no enhanced functionality to end users – "regardless of whether [the transmission involves] only one interexchange carrier . . . or . . . multiple service providers." 2/ In that *Order*, the Commission reaffirmed its fundamental principle that an "end-to-end" analysis determines the regulatory classification of calls and which termination charges apply. In other words, the originating and terminating points of a call are what matter, and not how the call is routed or how many wholesale transmission providers may be involved. Similarly, basic principles of contract law and common, long-standing practice in the telecommunications industry make it clear that any access charges are due only from the party handing off the PSTN-to-PSTN call to the LEC and obtaining local termination service from that LEC. This conclusion is not only legally required; it also is fundamental to the operation of an efficient wholesale telecommunications market.

Although these legal principles are obvious, the Commission must nevertheless address the SBC and VarTec Petitions as soon as possible. 3/ Both petitions result from the

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2/ *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd 7457, ¶ 19 (2004) ("*AT&T IP-in-the-Middle Order*").

3/ WilTel takes no position at this time on the wireless intercarrier compensation issues raised in sections III and IV of VarTec's petition.

Commission's attempt to leave enforcement of access obligations to the courts. 4/ The Commission should accept its responsibility to promptly and clearly reaffirm for all market players (and the courts) the basic principles governing this area.

More broadly, these disputes underscore the critical need for a single rate for termination of all traffic to local exchange customers. Unless and until the long-pending Intercarrier Compensation Reform docket finally is completed, the Commission inevitably will be drawn into further litigation over certain entities' attempts to shift regulatory risk and responsibility for competitively crucial access expenses. The Commission must promptly establish a single unified termination rate, both to serve the public interest in efficient telecommunications, and to prevent waste of the parties' and the Commission's time and resources in disputes such as the ones underlying these petitions. Finally, pending such reform, the Commission should take other actions to minimize disputes that otherwise will arise as terminators and LECs determine what rates to apply to which traffic in a "non-unified, multi-rate" call termination environment.

II. SBC IS CORRECT THAT ILECs ARE ENTITLED TO COLLECT ACCESS CHARGES FROM PARTIES THAT HAND THEM PSTN-TO-PSTN LONG DISTANCE CALLS FOR TERMINATION.

There can be no doubt, following the *AT&T IP-in-the-Middle Order*, that ILECs are entitled to collect access charges when they terminate PSTN-to-PSTN long distance calls with no end-to-end net protocol conversion or other end-user enhancements. The Commission made it clear that access charges are due for termination of interstate long distance calls, regardless of the transport technology used, the purported regulatory status of the party that hands off the calls for

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4/ The Commission has ample reasons to act quickly on these petitions. Regrettably, the VarTec Petition already has sat at the Commission for over a year. The court in the underlying SBC litigation clearly expects a prompt answer from the FCC. *See* SBC Petition, Exhibit A (*Southwestern Bell Telephone, LP, et al., v. VarTec Telecom, Inc., et al.*, No. 4:04-CV-1303 (CEJ), Memorandum and Order (E.D. Mo., Eastern Div., Aug. 23, 2005)). Finally, so long as different PSTN termination charges apply to different categories of traffic, the issues presented in these petitions will continue to arise, including before the Commission.

termination, or the number of intermediate providers involved in the end-to-end transmission. 5/ In other words, following the Commission's long-standing jurisdictional principles, what matters for purposes of determining compensation requirements for a particular terminating call is the "end-to-end" nature of the call itself (based on the originating and terminating points), and not the identity or purported status of the entities involved in the transmission, or what other kind of traffic they carry that may be entitled to different termination rates. The FCC's conclusion limits unlawful discrimination or uneconomic arbitrage by ensuring that the same access charge treatment applies whether the call is transported over one network or more than one, a crucial issue that AT&T and WilTel emphasized in the *AT&T IP-in-the-Middle* proceeding. 6/

Given the Commission's clear ruling in that proceeding, there ordinarily would not be a need for another "declaratory ruling" here. However, the primary jurisdiction referral of the district court cited by SBC creates confusion in this area, as well as a duty to respond to the court itself. The Commission must promptly reaffirm that access charges are due on PSTN-to-PSTN long distance calls, and that the company handing such calls to the ILEC is the party responsible for paying the ILEC's access charges. This is so whether or not the entity passing the call to the ILEC for termination uses IP transmission, whether or not it hands off the call over Feature Group D or CLEC local interconnection trunks, and irrespective of whether the entity is also handing off other kinds of calls besides those qualifying for access charges. 7/ These entities' access charge obligations are based on the end-to-end nature of the traffic that they terminate over ILEC networks. Neither the claimed status as "information service providers," nor the use

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5/ *AT&T IP-in-the-Middle Order*, ¶ 19 & n.80.

6/ *See, e.g., id.*, n.81.

7/ SBC Petition at 21.

of IP technology, is relevant for purposes of evaluating whether ILEC access charges are due on particular calls. 8/

Most importantly, WilTel strongly agrees with SBC that – as the Commission held in the *AT&T IP-in-the-Middle Order* – allowing some parties that pass calls to ILECs for termination to evade access charges that others must pay would result in unlawful discrimination, distort the competitive marketplace, and yield no public interest benefits. 9/ "[T]he policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services. It is that antidiscriminatory policy which lies at the heart of the common-carrier section of the Communications Act." 10/

III. VARTEC IS CORRECT THAT ILECs CANNOT IMPOSE ACCESS CHARGES ON CARRIERS WITH WHOM THEY LACK CONTRACTUAL PRIVITY

VarTec explains that ILECs only may recover access charges from their customers for such access service – and not from third-party companies further back in the multi-party chain of transmission. VarTec's position is consistent with black-letter contract law: "Since the obligations and duties arising out of a contract are due only to those with whom it is made, generally only a party to the contract, or one who is in privity, may bring an action on the contract for its breach." 11/ As with the issue raised by SBC and discussed above, there should be no need for a declaratory ruling to clarify this obvious and straightforward proposition. Nonetheless, since this issue appears to be dispute in a number of fora, the Commission should issue a ruling as expeditiously as possible.

8/ *Id.*, 17-24.

9/ SBC Petition at 23, citing *AT&T IP-in-the-Middle Order*, ¶¶ 17, 19.

10/ *AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 223 (1998), quoted in SBC Petition at 23.

11/ *Corpus Juris Secondum*, vol. 17B, § 610, p.315 (1999). In the case of ILECs' access charges, tariffs take the place of contracts to specify the rates, terms, and conditions governing the transaction between the parties. However, the privity requirement continues to apply.

Not only does the ruling sought by VarTec – that ILECs may recover access charges only from directly interconnecting parties with whom they have privity – flow from basic principles of contract law, it is also consistent with common industry practice and promotes an efficient and competitive long distance market. As the Commission is well aware, carriers often hand off PSTN-originated traffic to other parties for termination to an ultimate PSTN destination. These providers of wholesale long distance transmission and PSTN termination services, referred to in these comments as "Call Termination Providers," supply a valuable service. 12/ For example, they enable IXCs, wireless carriers, CLECs, and others with limited geographic reach to transmit traffic destined for a LATA where they may not have facilities. Call Termination Providers also enable their wholesale customers to improve service reliability for their own customers. For example, a Call Termination Provider can fill the breach and supply extra capacity for IXCs that usually terminate calls directly to ILECs themselves, but that sometimes have overflow traffic exceeding their termination trunk's capacity. Call Termination Providers can provide diversity routing to handle traffic when a network outage occurs. And sometimes it is simply more efficient for carriers to route the call to another entity rather than to deal directly with multiple terminating ILECs.

Call Termination Providers compete vigorously based on the price and quality of their services. They contract with their customers to sell their termination services for a defined price, and it is then up to the Call Termination Provider to design its own network and make its own arrangements with ILECs, CLECs, and others. The more efficiently it does so, the greater its

12/ SBC refers to these vendors as "least cost routers," though that term may be too broad because in some cases least cost transport routers in turn may contract with other vendors for call termination service.

profit on the termination services it sells. 13/ The customers of a Call Termination Provider often will not even know with whom the entity is contracting downstream, and there is no business reason to know this information. The customer of the Call Termination Provider seeks only termination of its calls to their intended destinations.

As in other competitive markets, the prices paid to Call Termination Providers, and the scope and terms of the termination service, are governed by the contracts negotiated between the parties. 14/ If either party breaches the contract, it may be liable to the other party for that breach. In turn, Call Termination Providers handing traffic to ILECs for termination are subject to the contractual or tariffed rates and terms applicable to the PSTN service provided by the ILEC. 15/ These rates and terms apply only to the company seeking and using the termination

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13/ Given the competitive significance of access charges, incentives also arise for certain Call Termination Providers to minimize their access payments to LECs by arguably unlawful means, or otherwise game the current irrational intercarrier compensation system. *See supra,* Section II. WilTel has spoken elsewhere of the need for clear action in this area to prevent severe market distortions at the expense of carriers who want to follow the rules. *See, e.g.,* Letter from Peter A. Rohrbach, counsel to WilTel, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 03-266 and 04-36 (filed Feb. 18, 2005), transmitting White Paper: *Broadband VoIP Termination to the Public Switched Network: Advancing VoIP Through Non-Discrimination* (Feb. 18, 2005); Letter from Blaine Gilles, Senior Vice-President, Voice Services and Strategic Markets, WilTel Communications, LLC, to Chairman Michael K. Powell, WC Docket No. 03-133 (filed Aug. 27, 2004).

14/ Similarly, the Call Termination Provider bears the risk that its network costs and purchases of service from other parties, including access purchased from LECs, will exceed the price it charges its customers for its service. In particular contracts, the Call Termination Provider and its customer may privately decide on measures to balance this or other risks between them. *See* SBC Petition at 22 (discussing indemnification and risk-shifting provisions in PointOne's contracts with its customers and with the carriers with which it interconnects). But that in no way creates independent liability to third parties such that, for example, a LEC or other vendor of a Call Termination Provider can make claims directly against the Provider's own customers.

15/ SBC confirms that its access tariffs, as well as common industry practice, require that downstream call termination providers – and *not* the upstream retail carriers that purchase their services – pay access charges when they hand off calls to the ILEC for termination. "[R]etail providers of interexchange telephone service routinely rely upon wholesale providers of long distance transmission in order to terminate interexchange calls. Where they do so . . . access charges are routinely assessed on *the wholesale provider*. . . . That same result applies here." SBC Petition at 21 (emphasis in original). *See also* SBC Dignan Decl. ¶ 6 ("SBC's tariffs require that interexchange calls be terminated over Feature Group D facilities, regardless of whether the company that is terminating the interexchange calls to an SBC local network is the originating long-distance carrier or, instead, is carrying the calls 'downstream' from the originating carrier. In the latter situation – where multiple carriers are involved – the SBC local exchange carrier typically bills access charges to the last company in the stream that carriers the interexchange calls (*i.e.*, the company that hands the calls to the SBC local exchange carrier over the Feature Group D trunk), and it is this company that remits payment for the access charges to the SBC local exchange carrier . . . . This is the common practice in the telecommunications industry, and legitimate downstream carriers of interexchange calls – *i.e.*, carriers that provide wholesale transmission to other carriers – have understood and followed it for years.").

services provided by the ILEC, and not to the IXC or other carrier that hands the call to that company, which has no contractual privity with the ILEC.

This is as it should be. In a free market economy, the enforcement of contracts that parties have negotiated on an arms' length basis promotes economic efficiency. By contrast, regulatory fiat imposing costs on parties they did not bargain for would distort the marketplace and generate uncertainty and economic inefficiency. Nothing in the Commission's rules or orders requires a contrary conclusion. To be sure, Section 69.5(b) of the Commission's rules requires access charge payments from "interexchange carriers," but only in cases where such carriers actually "use [the ILEC's] local exchange switching facilities . . . ." 47 U.S.C. § 69.5(b). The *AT&T IP-in-the-Middle Order* specifically notes that some entities may qualify as "interexchange carriers" for purposes of 47 C.F.R. § 69.5(b) even if those entities also provide other services or characterize themselves as something other than IXCs. What matters for this purpose is the nature of the specific call they hand off to the ILEC. 16/ In any event, nothing in the *AT&T IP-in-the-Middle Order* or any other FCC decision circumvents the black-letter contract principles surrounding contractual privity. Restatement of these principles ordinarily would not call for a "declaratory ruling." However, given the current enforcement disputes, the public interest is served by prompt action addressing the VarTec Petition.

IV. THE COMMISSION MUST IMPLEMENT A UNIFIED, SINGLE RATE THAT APPLIES TO ALL INTERCONNECTED TRAFFIC.

Beyond the specific issues addressed in the SBC and VarTec petitions, these controversies highlight the industry's struggle with Commission rules that arbitrarily distinguish between different types of traffic. Most of the issues raised in the SBC and VarTec petitions would be avoided, going forward, were it not for the substantial (and artificial) rate differences

16/ *AT&T IP-in-the-Middle Order*, n.80.

for termination of different categories of traffic. The Commission is well aware that termination service has the same underlying cost, and uses the same ILEC network facilities in the same way, regardless of jurisdiction or traffic type. Any rate differences for PSTN termination are irrational, unlawful, and must be abolished.

As the Commission and much of the industry have recognized, rate discrimination based on jurisdiction and traffic type drives firms to engage in arbitrage and seek new "classifications" for their traffic and for their firms. For example, because current access rates substantially exceed local interconnection rates, companies have tremendous incentives to label their traffic falsely to obtain the more favorable rates.

WilTel once again urges the Commission to complete its reform of intercarrier compensation as soon as possible, and to adopt a single rate for all use of the PSTN. Such action will allow companies to focus their time and resources on running a business rather than on trying to find regulatory loopholes to arbitrage.

V. PENDING CREATION OF A UNITARY TERMINATION RATE, THE COMMISSION MUST MANDATE AND ENFORCE MEASURES TO DISTINGUISH TRAFFIC FOR PURPOSES OF INTERCARRIER COMPENSATION

Until the FCC reforms intercarrier compensation, different kinds of traffic will continue to be subject to different PSTN charges, and companies and the FCC will continue to have to distinguish among such traffic. This problem is well-explained in the *Intercarrier Compensation* rulemaking. It also applies insofar as IP-originated traffic is subject to a different termination rate.

In some cases it may be difficult for the ILEC to determine the true nature of certain traffic, and therefore bill the Call Termination Provider the correct charge, absent cooperation from that provider. This is a relatively small problem in the context of total traffic, but it is one

that creates substantial room for dispute and abuse. The Commission should address this problem now, coincident with acting on these two Petitions, and pending final action in the *Intercarrier Compensation* rulemaking.

Specifically, the Commission should require LECs to cooperate with Call Termination Providers and other terminators (IXCs, CLECs, etc.) to identify different types of traffic through reasonable mechanisms. To maximize the availability of identifying information to the terminating carrier, the Commission must enforce its rules addressing accurate population of identifying information into billing and routing fields, and the passing of such information to terminating carriers. The Commission should emphasize that it will impose significant penalties for improper use or manipulation of such data. In addition to enforcing existing rules, the Commission may need to consider adopting new requirements regarding accurately populating and transmitting the necessary data to identify calls, as suggested by parties commenting on the "phantom traffic" issue in the *Intercarrier Compensation* docket. 17/

For the limited category of remaining traffic where categorization cannot be done electronically, the Commission should require reasonable "PIU-type" certification and audit procedures to distinguish traffic types – and ILECs should be required to cooperate with Call Termination Providers, CLECs, IXCs and others to develop such mechanisms. For example, related issues have been raised in the petition filed by Grande Communications, Inc., regarding LECs' right to rely on customers' certifications regarding the jurisdictional nature of

17/ Representatives of all sides of the industry have presented extensive information and advocacy regarding the so-called "phantom traffic" issue. *See, e.g.,* Ex Parte Letter from Robert C. Rowe on behalf of CenturyTel, Consolidated Communications, FairPoint Communications, Iowa Communications, TDS, and Valor Communications, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (filed Oct. 18, 2005); Ex Parte Letter from Patrick J. Donovan, counsel to PacWest Telecomm, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (filed Oct. 14, 2005); Ex Parte Letter from Eric Einhorn, counsel to SBC, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (filed Aug. 11, 2005); Ex Parte Letter from Paul Garnett, counsel to CTIA-The Wireless Association, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (filed Aug. 9, 2005); Ex Parte Letter from Karen Brinkmann, counsel to CenturyTel, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (filed May 27, 2005).

IP-originated and other interconnected traffic, and other intercarrier compensation implications of customer certifications. 18/ An auditable certification process should work in the short term to minimize disputes in this area. But ideally technical solutions should be developed to enable carriers to distinguish between all types of traffic electronically and in real time.

None of this is new. The industry already has a long history of reconciling differing access charges for interstate and interstate long distance calls. It has established electronic systems, and it has used proxy processes while electronic systems were under development. Adequate enforcement also would buttress and encourage contractual and tariff-based audit processes necessary to distinguish traffic types. A number of parties have raised related issues before the Commission regarding the problem of so-called "phantom traffic" – *i.e.*, terminating calls that are handed off to LECs without the electronic identification data needed to bill access charges. 19/ The Commission should consider appointing an independent auditing agency to address factual issues and engage the parties in mediation.

These actions will reduce the likelihood of disputes between a LEC and a party handing the LEC calls for termination over the PSTN. To be clear, however, any current deficiencies in these areas do not give a LEC the independent legal right to seek access charges from third party customers of the Call Termination Providers with whom the LEC itself has no contractual relationship.

18/ Grande Communications, Inc., Petition for Declaratory Ruling Regarding Self-Certification of IP-Originated VoIP Traffic, WC Docket No. 05-283 (filed Oct. 3, 2005); Public Notice, *Pleading Cycle Established for Grande Communications' Petition for Declaratory Ruling Regarding Intercarrier Compensation for IP-Originated Calls*, WC Docket No. 05-283, DA 05-2680 (Oct. 12, 2005). WilTel takes no position at this time on the issues raised in the Grande petition, but simply notes their importance and relevance to the matters at issue here.

19/ *See supra* note 17.

CONCLUSION

The Commission is in a position to act very quickly on these two petitions. They present no new or complex issues. VarTec merely asks the Commission to acknowledge basic black-letter contract law. SBC only asks the Commission to restate a decision it made last year in the *IP-in-the-Middle Order*.

But the Commission should not stop there; it should address the underlying cause of these and other similar disputes. It should complete long-overdue action in the *Intercarrier Compensation Rulemaking*, and adopt a single unitary rate for all use of the PSTN to terminate calls. In the mean time, the Commission should take actions to facilitate identification and charging for traffic qualifying for differing interconnection rate treatment so that at least all providers of the same kind of services pay the same LEC rates, without gaming, unintended arbitrage, or associated disputes. This action also is long overdue.

Respectfully submitted,

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